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COMMON GROUND: RECONCILING RIGHTS AND COMMUNAL CONCERNS IN REAL PROPERTY LAW

Thomas F. McInerney III*

But the most common and durable source of factions has been the various and unequal distribution of property. Those who hold, and those who are without property, have ever formed distinct interests in society. . . . The regulation of these various and interfering interests forms the principal task of modern legislation, and involves the spirit of party and faction in the necessary and ordinary operations of government.

—James Madison, *The Federalist*, No. 10.

I. INTRODUCTION

Reconciling competing interests in real property continues to present a challenge to American society. Recent Supreme Court decisions involving the Takings Clause of the Fifth Amendment present a new challenge through the expansion of individual rights to property. Chief Justice Rehnquist and Justice Scalia have been at the forefront of the Court's efforts to create a new-found fundamental right. Unlike other judicial attempts to expand the scope of constitutional rights, this departure seems drawn neither to fulfill some unmet societal need nor to fill a gap or inadequacy from existing precedent. Such movement is based on an outdated and philosophically questionable conception of real property rights.

Nowhere is this expansion of property rights more glaring than in the context of cases under the Takings Clause. In criticizing the conventional wisdom feeding our understanding of takings cases, this

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Essay will attempt to expose the ideological presuppositions making recent decisions seem "reasonable" despite the rather questionable philosophical basis for such views.¹ First, the author will analyze a number of recent Supreme Court takings cases to identify certain underlying principles. Next, the Essay will proceed with an analysis of three contemporary legal theorists to examine their views on community with a view to the role of real property in a community. Finally, using these theorists for guidance, the author will develop a communitarian view of real property to expose the problematic assumptions underlying the Supreme Court's takings jurisprudence. Specifically, the author will argue that, properly understood, property rights should be conceived as embodying certain communal concerns which eliminates some of the apparent conflicts between the rights of individuals and those of communities.

II. ANALYSIS OF RECENT SUPREME COURT CASES

To highlight the philosophical implications of the Supreme Court's takings jurisprudence, I have chosen four cases. In selecting the following cases (one is a dissent from a denial of *certiorari*), the author chose those which are most significant to understanding the Rehnquist Court's conception of property rights. The Essay will focus chiefly on the portions of the opinions which implicitly or explicitly articulate the Court's broader philosophical understanding of the place of property rights under the Constitution.

A. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*

In *First English*, the Court held that a local government ordinance which prohibited construction on a flood plain constituted an impermissible taking under the Constitution, requiring compensation.² Writing for the majority, Justice Rehnquist sketched a factual back-

¹ Attention thus will be paid primarily to the fundamental meaning of the legal texts furnishing the backdrop for this Essay. Accordingly, the rhetoric of the Court's recent takings cases is somewhat secondary to the question of the logic underlying the propositions the Court announces. For a discussion of the structures of narratives, see Roland Barthes, *Structural Analysis of Narratives*, in *A BARTHES READER* 294-95 (1982). While this Essay does not purport to completely demystify the Court's recent cases, it does employ the insights of Barthes and other poststructuralists in developing critical perspectives.

² See *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987).

ground which at first glance would have seemed to support the regulation. The First Evangelical Church bought a 21-acre parcel of land in a canyon along a creek.³ The creek served as a drainage channel for a watershed area owned by the National Forest Service.⁴ On this land, the church built a number of lodges, a dining hall, and an outdoor chapel.⁵ The facility served as a retreat center and a recreational area for disabled children.⁶

In 1978, the creek overflowed following extensive flooding and destroyed all of the buildings on the property.⁷ Shortly thereafter, the County of Los Angeles passed an ordinance prohibiting construction of any structure on the flood protection area near the creek.⁸ The rationale for this regulation was to "preserv[e] the public health and safety."⁹ The church sued both the county and Flood Control District for creating dangerous conditions on properties upstream and for denying the church all effective use of the property by passing the ordinance in question.¹⁰ The church also sought to recover from the Flood Control District in inverse condemnation, alleging that the District's cloud seeding during a storm caused the flooding.¹¹ The trial court and appellate court rejected the church's inverse condemnation claim, relying upon a state court decision which prohibited suits for inverse condemnation when based on a "regulatory" taking.¹² The California Supreme Court denied review after which the United States Supreme Court granted *certiorari* to consider whether the case of *Agins v. Tiburon*, relied upon by the trial court, should preclude recovery in the case.¹³

In *Agins*, the California Supreme Court determined that claims for inverse condemnation would be invalid until a regulation had been

³ *Id.* at 307.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *First English*, 482 U.S. at 307.

⁸ *Id.* Specifically, the ordinance stated: "[a] person shall not construct, reconstruct, place or enlarge any building or structure, any portion of which is, or will be, located within the outer boundary lines of the interim flood protection area located in [the canyon]." *Id.*

⁹ *Id.*

¹⁰ *Id.* at 308.

¹¹ *Id.*

¹² *Agins v. City of Tiburon*, 598 P.2d 25, 32 (Cal. 1979), *aff'd on other grounds*, 447 U.S. 255 (1980). On the doctrine of regulatory takings, see *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

¹³ *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, California, 478 U.S. 1003 (1986).

found excessive on a writ of mandamus or a declaratory judgment.¹⁴ As such, the Court's review in *First English* was limited to the issue posed by *Agins*: whether the Just Compensation Clause, as an incorporated right, does not require compensation for a temporary "regulatory" taking.¹⁵ The Court neither ruled on the takings claim on the merits nor did it consider the argument that the takings claim could be resolved by considering the regulation a public safety measure.¹⁶

After clarifying the grounds on which the Court would entertain the case, Chief Justice Rehnquist noted that resolving the issue required "direct reference to the language of the Fifth Amendment."¹⁷ Under the "basic understanding" of the Amendment, any taking of property implicated the obligation to pay just compensation.¹⁸ As to what constituted a taking of property, the Court made familiar reference to Justice Holmes' opinion in *Pennsylvania Coal v. Mahon*, which recognized that certain regulatory takings are takings requiring compensation.¹⁹ In *Pennsylvania Coal*, Justice Holmes created the ambiguous standard used by the Rehnquist Court to analyze regulatory takings claims. Under this doctrine, "[t]he general rule at least is, that while property may be regulated to a certain extent, if a regulation goes too far it will be recognized as a taking."²⁰ Rehnquist next moved to the question of whether a taking may occur absent even a formal eminent domain proceeding.²¹ Naturally, he concluded, "the entire doctrine of inverse condemnation" stands for the proposition that a regulation may effect a taking without a property-specific eminent domain proceeding.²² Finally, the Court recognized the policy rationale for giving land use planners freedom as well as the inhibitions posed by the inverse condemnation remedy, yet noted that such arguments against the inverse condemnation remedy would be subsidiary to the ultimate Fifth Amendment right to just compensation.²³

After resolving these preliminaries, the Court turned to the question of whether a government's decision to cease its engagement in condemnation proceedings would require compensation for the period

¹⁴ *First English*, 482 U.S. at 308-09.

¹⁵ *Id.* at 310.

¹⁶ *Id.* at 313; see also *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962).

¹⁷ *First English*, 482 U.S. at 314.

¹⁸ *Id.* at 315.

¹⁹ *Id.* at 316.

²⁰ *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 415 (1922).

²¹ *First English*, 482 U.S. at 316.

²² *Id.*

²³ *Id.* at 317.

during which the property was unusable by the property owner.²⁴ Applying the *United States v. Dow* case,²⁵ the Court concluded that given the fact that an owner would be deprived of his use of land for the period during which the government's regulation was effective, a temporary taking had occurred, which required compensation.²⁶ While the Court recognized that fluctuations in value by reason of legislative deliberation do not constitute a taking, the Court decided that "depreciations in value by reason of preliminary activity" do not constitute a taking, but that where a taking already has occurred, the government must provide compensation during the period of the effective taking.²⁷

The dissenters, led by Justice Stevens, chose to discuss the merits of the case, but noted that "the Court [did] not hold that appellant is entitled to compensation as a result of a flood protection regulation."²⁸ Indeed, the dissenters argued that the regulation could not have constituted a taking.²⁹ On Justice Stevens' analysis, the loss of life and the destruction caused by the tragic flood provided a sufficient basis in fact to conclude that the church never could rebuild on the land, and thus never could have suffered a taking in the first place.³⁰

In view of the fact that the constitutional question was perhaps not ripe for Supreme Court review, the implications of *First English* for takings jurisprudence are unclear. At a minimum, the case demonstrates the Court's desire to take takings claims more seriously, at least by ensuring that land owners receive a remedy for regulations which decrease the economic value of land. Nonetheless, in view of the rather dubious takings claim when considered on the merits—it would appear to be a valid safety regulation under traditional tests³¹—*First English* may have foreshadowed the Rehnquist Court's future expansion of Takings Clause jurisprudence.³²

²⁴ *Id.* at 317–18.

²⁵ See generally *United States v. Dow*, 357 U.S. 17 (1958).

²⁶ See *First Evangelical*, 482 U.S. at 319, 321–22.

²⁷ See *id.* at 320, 321.

²⁸ *Id.* at 325.

²⁹ *Id.*

³⁰ *Id.* at 327–28.

³¹ See generally *Mugler v. Kansas*, 123 U.S. 623 (1887).

³² Some commentators have considered the Court's willingness to hear takings cases evidence of a departure from traditional "restraint in takings cases." Randall T. Shepard, *Land Use Regulation in the Rehnquist Court: The Fifth Amendment and Judicial Intervention*, 38 CATH. U.L. REV. 847, 848 (1989). If such traditional reluctance, as the author suggests, was based on the Court's belief in the need to consider the full factual record, it is unclear whether this new tendency has disavowed such a judicial policy or whether the cases chosen are simply factually clear. *Id.*

B. *Nollan v. California Coastal Commission*

In *Nollan*, Justice Scalia, writing for a five-person majority, held that a governmental body could condition the grant of a building permit to a land owner on the owner's grant of an easement back to the government, provided that the condition substantially furthered government purposes.³³ While upholding the condition, the Court concluded that such an easement would require compensation.

The Nollans owned a beachfront lot on the California coast.³⁴ The lot was situated between a public beach and a public park.³⁵ Between the beach and the rest of the property stood an eight-foot high sea wall. The Nollans originally leased the property with an option to buy. This option had been conditioned on their promise to demolish the bungalow then on the lot and replace it.³⁶ The Nollans sought the approval of the Coastal Commission, as required under state law, to build a three-bedroom house on the site of the previous 504-square-foot bungalow.³⁷

In reaching its decision, the Coastal Commission held public hearings and determined that the proposed development would burden the public's ability to walk along the shorefront, would increase private use of the shorefront, and would block views of the shore, thus preventing the public from recognizing—psychologically, at least—their right to visit the shore.³⁸ On appeal, the Court of Appeals ruled that while the condition diminished the value of the property, it did not deprive them of all reasonable use and thus was not a taking of property requiring compensation.³⁹ The Supreme Court took the case solely to decide the takings issue.⁴⁰

From the outset, Justice Scalia noted that had it not been a case involving a condition but instead an outright grant of an easement, it would have been a taking requiring compensation.⁴¹ This rested on the fact that he considered the right to exclude others "one of the most essential sticks in the bundle of [property] rights."⁴² Where a

³³ See *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 836 (1987).

³⁴ *Id.* at 827.

³⁵ See *id.*

³⁶ *Id.* at 828.

³⁷ See *id.* at 827–28.

³⁸ See *Nollan*, 483 U.S. at 828–29.

³⁹ See *id.* at 830.

⁴⁰ See *id.*

⁴¹ See *id.* at 831.

⁴² *Id.* (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982)).

"permanent and continuous right to pass to and fro" is given to the public, even where an individual may permanently situate himself on the premises, a permanent physical invasion has occurred.⁴³

The fact that the Coastal Commission publicly announced its policy of requiring easements along the coast, was considered unpersuasive by Justice Scalia.⁴⁴ The right to build, Justice Scalia asserted, was not a government benefit which land owners could be required to exchange voluntarily.⁴⁵ Justice Scalia next announced the long standing rule that a land use regulation which "substantially advance[d] legitimate state interests" and did not "den[y] an owner economically viable use of his land" would not constitute a taking.⁴⁶ While the government would be permitted to exercise broad powers in this regard, he dismissed the government's stated purposes in *Nollan* as pretextual.⁴⁷ The real problem was the conditioning, though as Justice Scalia noted, an outright denial of the permit would have been permissible.⁴⁸ In rejecting the government's stated purpose, Justice Scalia claimed that on these facts, the condition imposing the easement would have been an "outright plan of extortion."⁴⁹ The rest of the opinion consists of Justice Scalia's scrutiny of the stated purposes behind the regulation.

The *Nollan* case is important to the development of the Rehnquist Court's approach to the Takings Clause as it represents a departure from the minimum rationality standard applicable to regulatory takings cases toward the new standard of strict scrutiny.⁵⁰ Much of the opinion consists of Justice Scalia's criticism of the stated purpose for the law. This type of scrutiny over regulations which detrimentally

⁴³ *Nollan*, 483 U.S. at 832. Commentators have considered the permanent physical occupation to amount to a *per se* rule against takings based on the holding of *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). See generally Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles, Part II—Takings as Intentional Deprivations of Property Without Moral Justification*, 78 CAL. L. REV. 53 (1990).

⁴⁴ See *Nollan*, 483 U.S. at 833–34 n.2.

⁴⁵ See *id.*

⁴⁶ *Id.* at 834.

⁴⁷ *Id.* at 835–36.

⁴⁸ *Id.*

⁴⁹ *Nollan*, 483 U.S. at 837.

⁵⁰ Although Justice Scalia used the term "substantially advance" as the criteria for evaluating state interests in takings cases, he departed from the traditional use of these words as a deferential standard of review while applying a standard of "nearly compelling." See J. Freitag, Note, *Takings 1992: Scalia's Jurisprudence and a Fifth Amendment Doctrine to Avoid Lochner Redivivus*, 28 VAL. U. L. REV. 743, 759 n.98 (1994). See also Robert A. Williams, Jr., *Legal Discourse, Social Vision and the Supreme Court's Land Use Planning Law: The Genealogy of the Lochnerian Recurrence in First English Lutheran Church and Nollan*, 59 U. COLO. L. REV.

affect the economic well-being of citizens is novel. Moreover, the type of scrutiny the Court employed seems in tension with the portion of the *First English* case in which the Court acknowledged that mere decreases in value, which did not meet a given threshold or go "too far," would not constitute takings.⁵¹ Justice Scalia's opinion wrongly assumed that the Nollans actually owned the property and were subject to the condition of the easement as an infringement on their ownership rights. The Nollans only held an option to purchase, conditioned on their building of a new structure. When the Coastal Commission imposed a general shoreline easement requirement, the Nollans' option might have been affected, but not the value of the entire property. As such, it is difficult to see how the facts of *Nollan* would meet the threshold discussed in *First English*. Moreover, the new two-prong test of "substantially advancing state interests" and the denial of "economically viable use of land" was unprecedented. This new test, with the concomitant strict scrutiny standard, set the course for the Court's current direction in evaluating takings claims.

C. *Lucas v. South Carolina Coastal Council*

In *Lucas*, the Supreme Court held that an environmental regulation which prevented a property owner from developing his land by building homes on it exacted a taking by depriving the owner of all beneficial use of the property.⁵² Lucas purchased two residential lots on the Isle of Palms in South Carolina in 1986 intending to build residential homes on the properties.⁵³ South Carolina's legislature enacted legislation in 1988 which effectively barred Lucas from building any permanent habitable structures on the land.⁵⁴ The South Carolina Supreme Court rejected Lucas's argument that he had suffered a taking, holding instead that the legislation was designed to prevent "serious public harm" by protecting a public resource, thus precluding a takings claim.⁵⁵

427, 472 (1988) (noting that Justice Scalia's footnote rebuttal to Justice Brennan "can be safely read for the proposition that private property interests are as fundamental as first amendment interests, and are thus deserving of heightened judicial protection.").

⁵¹ See *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. at 329-30 (1987).

⁵² *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

⁵³ *Id.* at 1008.

⁵⁴ *Id.* at 1008-09.

⁵⁵ *Lucas v. South Carolina Coastal Council*, 404 S.E.2d 895 (S.C. 1991). In support of its holding, the court cited *inter alia* *Mugler v. Kansas*, 123 U.S. 623 (1887), for the proposition

In Justice Scalia's opinion for the Court, he makes clear the fact that Lucas purchased the property specifically to develop it.⁵⁶ When he purchased the property, the state did not require him to seek a permit from the Coastal Council.⁵⁷ Nonetheless, by the time the South Carolina Supreme Court was deciding the case, the legislature had authorized the issuance of "special permits" which could have allowed Lucas to build anyway.⁵⁸ Over ripeness questions, the Court chose to take the case as the justices concluded that Lucas had alleged a sufficient Article III injury in fact.⁵⁹

The main portion of the five-person majority opinion began with the familiar regulatory taking doctrine announced in *Pennsylvania Coal* which required compensation for takings that went "too far."⁶⁰ Eschewing any "set formula" for regulatory takings questions,⁶¹ Justice Scalia articulated two specific categories of regulations requiring compensation: "[The] first encompasses regulations that compel the property owner to suffer physical 'invasion' of his property. . . . The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land."⁶² Without explaining the significance in terms of these two general categories, Justice Scalia next stated, "the Fifth Amendment is violated when [a] land-use regulation 'does not substantially advance legitimate state interests or denies an owner economically viable use of his land.'"⁶³ As to the threshold of what constitutes "deprivation of all economic value," Justice Scalia looked to "the owner's reasonable expectations [. . .] shaped by the State's law of property."⁶⁴ In other words, the "degree the State's law has accorded legal recognition and protection to the particular interest in

that government legislation to protect the health and safety or prevent noxious uses of property would preclude takings claims. *Id.* at 899.

⁵⁶ See *Lucas*, 505 U.S. at 1008.

⁵⁷ See *id.* at 1011.

⁵⁸ See *id.*

⁵⁹ See *id.*

⁶⁰ *Id.* at 1014; See generally *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

⁶¹ *Lucas*, 505 U.S. at 1015.

⁶² *Id.*

⁶³ *Id.* at 1016.

⁶⁴ *Id.* at 1016 n.7. Justice Scalia does not define the threshold for discerning between partial diminishment of value and "total" regulatory takings. See Richard A. Epstein, *Lucas v. South Carolina Coastal Council: A Tangled Web of Expectations*, 45 STAN. L. REV. 1369, 1374 (1993) (favoring compensation for partial takings).

land" serves as the criteria to evaluate the extent to which the owner was deprived of his interest in the land.⁶⁵

As to the justification for the rule that compensation is required when the owner is deprived of all economic use of the land, Justice Scalia noted that normal principles of deference to the government's regulatory efforts were invalid when such a serious deprivation occurs.⁶⁶ More important to the apparent justification was his anti-utilitarian argument that private individuals should not be pressed into serving the general public or common good through regulations on their land.⁶⁷

The remainder of Justice Scalia's opinion is dedicated to his rejection of the argument that the regulation in question could be justified as an instance of the state's use of its police powers to prevent public nuisances.⁶⁸ The harmful or noxious use doctrine is simply "the progenitor" of the Court's "substantially advanc[ing] legitimate state interest" test.⁶⁹ Employing his characteristic normative relativism, Justice Scalia next argued that what confers a benefit or imposes a burden will vary "in the eye of the beholder."⁷⁰ As the Court could not determine whether a real harm exists, and because the regulation totally eliminated the economic value of the land, Justice Scalia reasoned, compensation is required.⁷¹ The only exception to such a compensation requirement could arise in situations in which the owner's expectations could not have been defeated as the land was owned subject to background principles of nuisance and property law, which would have justified the taking in question.⁷²

The *Lucas* case continued the strict scrutiny analysis begun in *Nollan*. As Justice Scalia saw it, environmental regulations designed in the words of the legislature to "protect[] life and property . . . provide [a] habitat for numerous species of plants and animals [and] . . . provide[] a natural health environment for . . . leisure time[,] "⁷³ should be subject to strict scrutiny when the regulation prohibits "economically viable use" of the land.⁷⁴ Why the common law should

⁶⁵ *Lucas*, 505 U.S. at 1016 n.7.

⁶⁶ *See id.* at 1026.

⁶⁷ *See id.* at 1018.

⁶⁸ *See id.* at 1020-21.

⁶⁹ *Id.* at 1023-24.

⁷⁰ *See Lucas*, 505 U.S. at 1024-25.

⁷¹ *See id.* at 1024-25, 1031-32.

⁷² *See id.* at 1027, 1029.

⁷³ *Id.* at 1020 n.10.

⁷⁴ *Id.* at 1020. Acceptance of the economic criteria for determining whether a taking has occurred has not been universal even among those approving of *Lucas's* holding. *See, e.g.*, Daniel

furnish the *only* relevant background principles affecting a property owner's expectations is unstated.⁷⁵ The Court failed to provide an argument justifying its limited consideration of the types of values or moral principles adhered to by a community. Would a community's commitment to strong environmentalism as an overarching norm allow a newcomer to simply ignore the community's will and expect compensation in the event a new regulation economically harmed them? It seems in Justice Scalia's relativistic refusal to actually judge the nature of the harm in question, he somehow succeeded in applying strict scrutiny to the regulation, thus exposing a thinly-veiled antipathy to environmental regulation.

D. *Stevens v. City of Cannon Beach*

Justice Scalia's apparent satisfaction with his *Lucas* opinion led him to write a dissent to the Supreme Court's denial of *certiorari* in *Stevens v. City of Cannon Beach*.⁷⁶ The Stevens purchased a parcel of land on the Oregon coastline in 1957 and sought a permit to build a seaway on the dry-sand portion of the property.⁷⁷ In 1969, in *Thornton v. Hay*, the State of Oregon sought an injunction to prohibit beachfront property owners from building on the "dry-sand" portion of their property.⁷⁸ On appeal from the grant of the injunction, the Supreme Court of Oregon held in *Thornton* that based on the "English doctrine of custom" a large area of land may be treated uniformly, which supported the right of the people of Oregon to use the beaches for recreational purposes.⁷⁹ When certain property owners sued in 1989 for a determination that property adjacent to their property included a dry-sand area, which would have provided access to the defendant's dry-sand beach,⁸⁰ the plaintiffs argued that under the

A. Farber, *Public Choice and Just Compensation*, 9 CONST. COMMENTARY 279, 304-05 (1992) (arguing that the functional equivalence of a government acquisition ought to control the takings determination).

⁷⁵ See *Lucas*, 505 U.S. at 1027-29. It is not even clear what notion of expectations Justice Scalia intended to privilege. See Epstein, *supra* note 64, at 1370. Epstein notes the ambiguity in Justice Scalia's use of "investment-backed expectations" in some contexts and "reasonable expectations" in others. See *id.* This ambiguity is not without significance as Epstein explains, since adoption of one definition leads to privileging investment activity as opposed to the expectations of all owners of property. In his equivocation, Justice Scalia does offer some insight into the pro-business motivation for the decision.

⁷⁶ *Stevens v. City of Cannon Beach*, 510 U.S. 1207 (Mem.) (1994) (Scalia, J., and O'Connor, J., dissenting).

⁷⁷ See *id.*

⁷⁸ See *id.* (citing *Thornton v. Hay*, 462 P.2d 671 (Or. 1969)).

⁷⁹ *Id.* (quoting *Thornton*, 462 P.2d at 676).

⁸⁰ See *id.* at 1209 (citing *McDonald v. Halvorson*, 780 P.2d 714 (Or. 1989)).

doctrine of custom, defendant's property was public land.⁸¹ The Supreme Court of Oregon in *McDonald v. Halvorson* refused to recognize that the doctrine of custom encompassed "the entire Oregon coast," and that the plaintiffs needed to show that the doctrine of custom applied to the parcel in question.⁸²

When the Stevens brought their suit for inverse condemnation to allow the building of the seawall, they argued that the holding in *McDonald* should have demonstrated that if they could prove their land was not subject to the custom concerning the dry-sand area, they should be permitted to build.⁸³ The Stevens never were permitted to submit evidence regarding this custom, and the Supreme Court of Oregon relied on *Thornton* in holding that the historic use of the beach property by the public sufficed to demonstrate the existence of a custom.⁸⁴ The highest court of Oregon, relying on *Lucas*, concluded that no taking could have occurred, as the custom prohibiting building on the dry-sand portion of the land was a background principle of property or nuisance law.⁸⁵ Perhaps dismayed by this application of his *Lucas* opinion, Justice Scalia employed his newly-forged sword of strict scrutiny. In his *Stevens* dissent, he argued that if "it cannot fairly be said" that this doctrine of custom actually existed, a taking would have occurred.⁸⁶ Nonetheless, because the determination of whether the doctrine of custom applied is factual in nature, Justice Scalia concluded that the Supreme Court could not consider the takings issues were it to hear the case on the merits.⁸⁷ Instead, he suggested that a due process argument might be appropriate as the Stevens were bound by the determination in *Thornton* to which they were not parties.⁸⁸

Given the fact that *Stevens* apparently implicates takings questions incidental to the *Lucas* opinion, it is somewhat unclear why the Court denied *certiorari*. Justice Scalia's colleagues may not share his apparent desire to further cement his strict scrutiny analysis of state laws pertaining to "background principles" or the regulations themselves. Alternatively, the articulation by the highest court of a state on an issue of state law may have dissuaded the other justices from granting

⁸¹ See *Stevens*, 510 U.S. at 1209 (Scalia, J., dissenting).

⁸² See *id.* (citing *McDonald v. Halvorson*, 780 P.2d at 724) (Scalia, J., dissenting).

⁸³ *Id.* (Scalia, J., dissenting).

⁸⁴ *Id.* at 1210 (Scalia, J. dissentng).

⁸⁵ See *id.* (Scalia, J., dissenting).

⁸⁶ *Stevens*, 510 U.S. at 1212 (Scalia, J. dissenting).

⁸⁷ *Id.* at 1213 (Scalia, J., dissenting).

⁸⁸ *Id.* at 1214 (Scalia, J., dissenting).

certiorari. Indeed, to the extent that a state supreme court is the most authoritative source regarding state law, Justice Scalia's suggestion that the invocation of the doctrine of custom was pretextual, as in *Nollan*, makes little sense.

III. COMMUNITARIAN APPROACHES TO PROPERTY RIGHTS

In developing a communitarian vision of property rights, I will consider a number of contemporary theorists. Each theorist offers insights upon which one may reevaluate real property rights along communitarian grounds. These competing communitarian visions may provide some insight into the type of communitarian theory needed to explain the role of property in civil society. In so doing, I will explicate a conception of property as rooted in a community.⁸⁹

A. Ronald Dworkin's Rights-Based Communitarianism

In *Law's Empire*, Ronald Dworkin advances a complete jurisprudential theory.⁹⁰ For the purposes of this Essay, attention will be paid to the communitarian elements in the theory, while leaving aside his more global claims. One should recognize that Dworkin invokes communitarian arguments most notably in arguing for the moral obligation to obey the law.⁹¹ Nonetheless, his arguments for communitarianism in this context can be usefully applied in determining the proper scope of property rights.

Dworkin's appeal to communitarian justifications to support the legitimacy of state coercion through law is rather unorthodox. In contrast to the traditional assumption that law itself imposes an independent moral duty of obedience, Dworkin argues that our ties to others within a community compel us to follow the rules of that community. Dworkin suggests that associative or communal obligations which bind us to a group compel us to respect and follow the law: "I mean the special responsibilities social practice attaches to membership in some biological or social group, like the responsibilities

⁸⁹ The determination of the meaning of property must occur prior to the determination of what constitutes a taking. As Frederick Schauer has noted, arguments based on the text of the Constitution may be entitled to no more weight than arguments about our conception of property. The question of property, and its function in preserving community, thus remains logically and philosophically prior to the question of just compensation. Frederick Schauer, *Property as Politics*, 13 HARV. J.L. & PUB. POL'Y 60, 64 (1990).

⁹⁰ See generally RONALD DWORKIN, *LAW'S EMPIRE* (1987).

⁹¹ Dworkin views the moral obligation to obey the law as "close to a necessary condition" in order to justify state coercion (i.e., law). See *id.* at 191.

of family or friends or neighbors. Most people think that they have associative obligations just by belonging to groups defined by social practice"⁹² In other words, Dworkin alludes to a moral obligation to obey the law based on ties to one's community and individuals within that community. Here, he sounds quite like Hegel and his notion of *Sittlichkeit* or ethical life.⁹³

Dworkin further argues that our associative obligations are generally considered most important. "[F]or most people, responsibilities to family and lovers and friends and union or office colleagues are the most important and most consequential obligations of all."⁹⁴ This seems to ring true. Indeed, the notion of justice within political philosophy as concerned with rights and duties bears little importance to our everyday lives. Pacts, agreements and responsibilities we have with others are much more frequently the source of moral dilemmas than are moral principles upheld by the government. Dworkin justifies this argument by recourse to an interpretive methodology whereby he uncovers principles of morality embedded in the structure of society. These principles or norms of communities can be argued about and objectively understood, from within the group.

"[T]he concepts we use to describe these groups and to claim or reject these obligations are interpretive concepts; people can sensibly argue in the interpretive way about what friendship really is and about what children really owe their parents in old age."⁹⁵

The question he begs here is whether we interpret the traditions of our particular community like Michael Walzer does⁹⁶ or whether we make reference to some universal or Western notion of justice. From the context of his argument in *Law's Empire*, it would seem to be the former.⁹⁷

⁹² *Id.* at 196.

⁹³ See generally G.W.F. HEGEL, *SYSTEM OF ETHICAL LIFE* (H.S. Harris & T.M. Knox trans.) (1979). For a discussion and explanation of the notion of *Sittlichkeit*, see Jurgen Habermas, *Morality and Ethical Life: Does Hegel's Critique of Kant Apply to Discourse Ethics*, in *MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION* 195 (trans. Christian Lenhardt & Sherry W. Nicholsen 1990).

⁹⁴ DWORKIN, *supra* note 90, at 196.

⁹⁵ *Id.* at 197.

⁹⁶ See generally MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* (1983). Walzer argues that justice takes place in different "spheres," or in Wittgensteinian terms, "language games," which determine the elements of justice within that context. See *id.* at 61-63. Different contexts will support different substantive notions of justice. Walzer is a relativist of sorts. Yet his claim about spheres is universal, insofar as he believes that every sphere will embody different notions of justice.

⁹⁷ Dworkin has criticized Walzer on what appears to be more modernist grounds: "Walzer's relativism is faithless to the single most important social practice we have: the practice of

While confident that these communal ties bind us, Dworkin argues that persons need not explicitly consent to membership in these communities on the grounds that many of the obligations which arise are infrequently the objects of choice.⁹⁸ I do not choose my brother, yet few would doubt that my obligations to my brother are greater than to a stranger. In other words, the moral obligations that communities create are not the result of some social contract. Yet, neither are they fully transcendent. Were they fully transcendent, it seems unlikely that we would be speaking of communal obligations at all. Dworkin argues that communal obligations arise within a group simply by virtue of one's participation in group activities.⁹⁹

While Dworkin wants to preserve a non-normative dimension to the notion of community to leave room for differences in social relations, he resorts to certain normative requirements which serve as conditions for the possibility of a community. Specifically, he articulates four basic principles which may be considered *a priori* conditions for a group necessary to generate responsibilities between members. The first two principles simply define the domain of the group: the members of the group must consider the group's obligations as "special" or limited to the group as well as "personal" which tie all members of the group to one another.¹⁰⁰ These are constitutive principles. Additionally, he calls for two substantive principles, which infuse the group with certain moral qualities. First, "members must see these responsibilities as flowing from a more general responsibility each has of concern for the well being of others in the group . . ."¹⁰¹ This principle sounds quite like the notion of "equal concern and respect" he developed in *Taking Rights Seriously*.¹⁰² Not surprisingly, the second substantive principle suggests that "the group's practices show not only concern but an *equal* concern for all members."¹⁰³ These principles enable us to distinguish between a "bare" community (e.g. where people merely live among themselves) and a "true" community, embodying these substantive moral ideals.

worrying about what justice really is." RONALD DWORKIN, *A MATTER OF PRINCIPLE* 219 (1985). In other words, in this passage, Dworkin views justice as objective and rationally ascertainable, rather than merely a product of social interaction. It is unclear whether the later work in *LAW'S EMPIRE* departs from this universalistic approach.

⁹⁸ DWORKIN, *supra* note 90, at 197.

⁹⁹ *See id.*

¹⁰⁰ *See id.*

¹⁰¹ *See id.* at 200.

¹⁰² *See* RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 180 (1977).

¹⁰³ DWORKIN, *supra* note 90, at 200.

The principles announced by Dworkin give rise to a political community, from which a moral obligation to obey the law (or underpinning of property rights) might arise.¹⁰⁴ Dworkin seems to think that based on these four principles, we can interpret the nature of justice in the particular community. Such standards constitute localized norms of the community. The transcendent notion of justice only establishes a necessary condition for a community, without making a universalistic claim regarding all societies. Dworkin understands the importance of *Sittlichkeit*, but fails to abandon his desire for some sort of universal principles.

B. Roberto Unger and *The Critical Legal Studies Communitarian Vision*

Roberto Unger, the intellectual paragon of the Critical Legal Studies movement, has developed a comprehensive critique of liberalism while offering a program of action to avoid the alleged limitations of traditional liberalism.¹⁰⁵ Unger's thought is wide-ranging and attempting a general analysis of his work is outside the scope of this Essay. Accordingly, I will focus primarily on those aspects of his work involving his notion of a community of solidarity and its possible applications to considerations of property rights.

In advancing his political theory, Unger confronts liberalism's traditional rights-oriented conception of law and attempts to move beyond this approach to foster the development of communities.¹⁰⁶ Ac-

¹⁰⁴ Some theorists have argued that Dworkin intends to transform the nature of the sovereign by an organic fusion of individuals to the state. The community and the state become unified:

Like the sovereign, the state understood on the model of integrity is a single moral agent that is the source of the law. The community as sovereign, however, is neither the people themselves understood as prior to the state, nor an entity—e.g., king or parliament—that is distinct from the people themselves. Rather Dworkin's sovereignty is *the people as the state*. The closest parallel in the history of political theory is Rousseau's concept of the "general will," which is the whole of the state but not the aggregate of individuals who constitute the state.

Paul W. Kahn, *Community in Contemporary Constitutional Theory*, 99 YALE L.J. 1, 72 (1989). Although this vision may seem somewhat utopian, it may at least function as a regulatory ideal to which we should strive. By minimizing the alienation of members of society from the state we may best uphold the notion of political equality.

¹⁰⁵ For a general discussion of Unger's general political and philosophical stance, see generally ROBERTO UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* (1983) [hereinafter CLS]. See also MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* 64–74 (1987) (discussing Unger's rejection of dualistic aspects of liberal theory which posit a strong distinction between facts and values or reason and desire).

¹⁰⁶ Unger, CLS, *supra* note 105, at 36.

cordingly, Unger claims that the established system of rights in our contemporary political system lacks legal principles or entitlements which support the development of communities.¹⁰⁷ Unger considers communities to be "those areas of social existence where people stand in a relationship of heightened mutual vulnerability and responsibility to each other."¹⁰⁸ Unger's critique of rights involves a recognition that rights provide right holders unfettered discretion to exercise rights, thereby distorting the individuals' ties to other community members.¹⁰⁹ According to Unger, our attachment to rights involves an attempt to insulate ourselves from the broader society and prevents participation in the "give-and-take of communal life and its characteristic concern for the actual effect of any decision upon the other person."¹¹⁰

Unger's criticism of rights highlights an undesirable or unintended consequence of rights. Rights are trumps over the majority will; by definition they involve an attempt to shield individuals from the intrusion of social forces.¹¹¹ Indeed, as Dworkin suggests, such insulation may be necessary to maintain one's membership in a community.¹¹² As Unger argues, however, rights also can effectively remove the individual from a community, insofar as rights are enforced *against* the community. Unger attempts to reconcile these competing tendencies through a general communitarian theory.

Toward this end, Unger reconceives the legal system as providing a conduit for communal development, which must be read against a background of an empowered democracy. Within the liberating democratic system he envisions, interpersonal relations are freed from "the constraints of a background plan of social division and hierarchy."¹¹³ Once the society realizes a "recombination of qualities and experi-

¹⁰⁷ See *id.*

¹⁰⁸ See *id.*

¹⁰⁹ See *id.*

¹¹⁰ *Id.* But see generally Drucilla Cornell, *Beyond Tragedy and Complacency*, 81 Nw. U. L. REV. 693 (1987) (noting that Unger's emphasis on the self as context transcending or continually recreated suffers criticisms from other communitarians for "radical individualism"). Nonetheless, the individualist strand in Unger's thought is not an end in itself, and serves only to allow the full development of community through transformative movement based on individual will.

¹¹¹ See generally DWORKIN, *supra* note 102.

¹¹² See DWORKIN, *supra* note 90, at 211-14.

¹¹³ Unger, CLS, *supra* note 105, at 37. Unger's poststructuralism recognizes that since certain "reified patterns of living" determine the possibilities for existence, humans must reconstruct the social world in the hopes of creating new categories and institutions which affirm the human good. See Cornell, *supra* note 110, at 695.

ences associated with different social roles," the new foundation for a community must be made concrete in the form of "legal categories and protected [. . .] legal rights," thus establishing permanently "institutional support" for these newly realized social relations.¹¹⁴ Accordingly, Unger's newly conceived *formal* basis for community within a spirit of solidarity requires a simultaneous *substantive* change in the allocation of entitlements and material resources.

Unger sees traditional legal rights to property as constituting a significant obstacle to the creation of a community of solidarity.¹¹⁵ Property rights lie at the root of our failure to establish communal principles in the law: "[t]he consolidated property right had to be a zone of absolute discretion. In this zone the rightholder could avoid any tangle of claims to mutual responsibility. It was natural that this conception of right should extend to all rights."¹¹⁶ To deal with the negative effects of "social division and hierarchy" involved in traditional legal thought, Unger argues for four basic rights which provide for freedom from domination by society, while promoting the development of community.¹¹⁷

The first category of rights are immunity rights, which provide an absolute zone of freedom from the state and others.¹¹⁸ Immunity rights seem roughly equivalent to the traditional Anglo-American conception of rights. Second are "destabilization rights" which allow for shaking up existing social orders to "disrupt established institutions" which tend to entrench "social hierarchy and division" his whole project is designed to avoid.¹¹⁹ Thirdly, Unger views market rights as a form of entitlement, which provides persons with "divisible portions of social capital."¹²⁰ Finally, and most important to his theory, he posits solidarity rights of communal life which create legal claims to expectations generated through the myriad of social relations.¹²¹ As hybrid claims, solidarity rights are not the intentional creation of the state

¹¹⁴ Unger, CLS, *supra* note 105, at 37.

¹¹⁵ See *id.* at 38. Property rights, on Unger's analysis, are as much to blame in the lack of communal development as is the failure of the legal system itself to encompass community, "the absence of legal principles and categories suited to communal life turns out to be as much the surprising by-product of the legal form given to the market as the consequence of an inability to assimilate existing forms of community to the ruling visions of society." *Id.*

¹¹⁶ *Id.*

¹¹⁷ See *id.* at 39.

¹¹⁸ See *id.*

¹¹⁹ See Unger, CLS, *supra* note 105, at 39.

¹²⁰ See *id.*

¹²¹ *Id.* at 39-40.

or of individual will.¹²² Accordingly, the solidarity right evolves from standards of "good-faith loyalty and responsibility" which gain concrete form when the right holders establish boundaries to the exercise of rights to prevent injury to someone.¹²³

Unger's development of the notion of solidarity rights provides a basis to reconceive the relation of individuals within a community to each other and to the state.¹²⁴ He bases such reconception of individual relations to the community within a comprehensive theory of the self and the good. Under a "theory of organic groups," Unger envisions a basis for constructing a new social order.¹²⁵ Community, in Unger's writings, involves a complex array of principles and ideals, yet ultimately leads him to consider the means by which the theoretical construct may become instantiated in social life.¹²⁶

The chief object of his theory of community involves the determination of what "sympathetic social relations would look like and thus to describe the political equivalent of love."¹²⁷ Although an unconventional statement of political theory, Unger's advocacy of sympathy as an "institutional principle" of the group resembles Dworkin's notion of equal concern and respect.¹²⁸ This principle requires members to treat others as having complementary rather than antagonistic aims.¹²⁹ The second principle requires members of the group to subjectively experience shared communal values which furnish grounds by which the members of the group relate to each other as well as providing a basis for individual actions representative of the communal order.¹³⁰ Finally, the ideals of "[n]atural harmony, sympathy, and concrete universality"¹³¹ must be implemented into the daily working life of the members of the group.¹³² Together these principles provide a program for placing communitarian virtues at the basis of society. The norms require individuals to act with community values in mind. Here, Unger de-

¹²² See *id.* at 40.

¹²³ See *id.*

¹²⁴ See generally ROBERTO M. UNGER, *KNOWLEDGE AND POLITICS* (1975).

¹²⁵ See *id.* at 236-95.

¹²⁶ See *id.* at 261.

¹²⁷ *Id.*

¹²⁸ See *id.*; DWORKIN, *supra* note 102, at 198-99.

¹²⁹ See UNGER, *supra* note 124, at 261.

¹³⁰ *Id.*

¹³¹ *Id.* Concrete universality is the means by which individual members of the group see themselves as members of the wider species of humanity, thus furthering the ethical move to sympathy.

¹³² *Id.*

parts from the liberal tradition which he criticizes. The place of individual responsibility is tempered, however, by the creation of legal rights which facilitate the development of communal virtues.¹³³ It is simultaneously a top down and bottom up theory.¹³⁴

Unger's critique of traditional property rights as exclusionary claims which allow individuals to separate themselves from the larger society highlights the need for new theoretical underpinnings for real property law to create true social solidarity and communal development. The place of real property rights within the legal structure furnishing the basis for communal development requires further elucidation. Most significant among his communitarian contribution is his claim that members of the group must subjectively see other members sympathetically and his arguments in favor of minimizing the tendency of strong property rights to undermine democratic solidarity.

C. *Environmental Ethics Based on a Community of Virtue*

Eric Freyfogle's *Justice and the Earth* advances an environmental ethic, which places a normative constraint on property ownership in land.¹³⁵ Although a law professor by trade, Freyfogle's apparent impetus for the work was based on his own understanding of nature gained through his own property ownership in rural Illinois.¹³⁶ Accordingly, his work in this book does not constitute painstaking analy-

¹³³ Michael Walzer's communitarianism may be helpful in illustrating this point. Walzer's theory envisions two moments in which community is actualized: the moral community and the legal community. William A. Galston, *Community, Democracy, Philosophy: The Political Thought of Michael Walzer*, 17 POL. THEORY 119, 120-21 (1989). The moral community conjoins individuals around their "shared understandings of social goods," while the legal community involves the combination of individuals who "through specific acts of consent . . . create and delimit sovereign authority." *Id.* Unlike Walzer, though, Unger does not posit the congruence of these two forms of community. For Unger, this form of community can only arise through the agonistic process of political discourse and evolution. See UNGER, *supra* note 124, at 261-62.

¹³⁴ This result is similar to the theory of legitimacy developed in Jurgen Habermas' recent work. See JURGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* 408 (1996). Habermas conceives of a system of rights supporting individual autonomy as securing the conditions for democracy and as simultaneously supported by such democratic political system: "A legal order is legitimate to the extent that it equally secures the co-original private and political autonomy of its citizens; at the same time, however, it *owes* its legitimacy to the forms of communication in which alone this autonomy can express and prove

itself." *Id.*

¹³⁵ See generally ERIC T. FREYFOGLE, *JUSTICE AND THE EARTH* (1993).

¹³⁶ See *id.* at 1-17.

ses of Supreme Court precedents but instead furnishes an argument for a reconception of traditional notions of property rights.¹³⁷

Freyfogle first criticizes economists and legal theorists for the traditional property law view that land is a permanent asset.¹³⁸ Land, unlike fixed assets such as plant and equipment, gradually depletes.¹³⁹ Freyfogle notes that non-renewable resources are gradually depleted, thus requiring accounting practice to recognize this fact on corporate balance sheets.¹⁴⁰ Land is treated as a permanent asset, not reflective of the physical reality.¹⁴¹ By accounting for land differently, we might provide an incentive for less exploitation.¹⁴²

His second main criticism is the tendency of property owners to fully exploit land under their control.¹⁴³ Agricultural, mining, and timber companies attempt to achieve maximum returns on their land with no incentive to protect the environment beyond their own land.¹⁴⁴ Calculations of profits and losses may allow the property owner to reap profits over a number of years, yet might leave the land worthless when finished.¹⁴⁵ Freyfogle's argument thus directly opposes the Chicago School's complacent assumption that self-interest ultimately will provide sufficient constraints to prevent overuse.¹⁴⁶ It is this lack of incentive for owners of land to account for the wider interests¹⁴⁷ of

¹³⁷ See generally *id.* Freyfogle considers the reigning real property law to have gained a clear explication in Blackstone. Eric T. Freyfogle, *Owning the Wolf: Green Politics: Property Rights, Ecology Rights*, DISSENT, Fall 1994, at 481-82. Traditional English common law treated property as complete domination over the land. Our legal understanding of property involves an "image of a physical world divided into pieces and subject to private ownership and control, a countryside populated with castles, each which an owner who controls." FREYFOGLE, *supra* note 135, at 51. Property owners could thus freely use their land for whatever purpose they deemed proper. In modern times, this regime creates counter-intuitive results, as environmentalism has highlighted the need to consider property ownership as necessarily having an impact on the wider society.

¹³⁸ See FREYFOGLE, *supra* note 135, at 23-26.

¹³⁹ See *id.* at 25.

¹⁴⁰ See FREYFOGLE, *supra* note 135, at 25.

¹⁴¹ See *id.* at 25.

¹⁴² See FREYFOGLE, *supra* note 135, at 25-26.

¹⁴³ See *id.* at 31.

¹⁴⁴ See *id.* at 29.

¹⁴⁵ See *id.* at 31.

¹⁴⁶ See *id.* at 19-43.

¹⁴⁷ Note that by using the term "interest" I do not intend to anthropomorphize nature. Joel Feinburg's instrumental understanding of an interest appears closest to my true meaning. See JOEL FEINBURG, HARM TO OTHERS 33 (1984) ("If I have an interest . . . I have a kind of *stake* in [a thing's] well-being.").

the environment that leads Freyfogle to consider this another example of the tragedy of the commons.¹⁴⁸

Freyfogle's third argument focuses on externalities, defined as "activities that impose harms or benefits on others with no compensation paid to equalize the situation."¹⁴⁹ Indeed, as the example of wetlands shows, the impact on biodiversity and ecological systems does not become part of the calculation of harms and benefits.¹⁵⁰ Dumping toxic wastes into a river might be a clear case of nuisance and an infringement on health and safety¹⁵¹ but concern for species preservation and harms to persons who might live thousands of miles away are incompletely calculated.¹⁵²

Finally, Freyfogle explains that "free markets" are imperfect to the extent that competition tends to discourage preservation and privileges the unethical equally with the ethical.¹⁵³ Confronting the libertarianism of free market adherents, Freyfogle notes that individuals must be given an incentive to do right, or else an incoherent and incomplete system will develop.¹⁵⁴ Freyfogle considers economic approaches to land as out of sync with his own experience of land inhabited by living and breathing animals and beautiful flora.¹⁵⁵ The

¹⁴⁸ See FREYFOGLE, *supra* note 135, at 27.

Many observers believe that this common-pool story with its tragic conclusion captures a good part of our environmental predicament. Their suggestion is that too many of our resources are held and used in common, which prompts users to abuse. Our air is a common asset, and factories pollute it, in part because the costs of polluted air are shared with all who must breathe it. Many of our groundwater aquifers are declining rapidly and will soon face exhaustion, again because use is communal and each pumper has no incentive to be the one to stop.

Id.

¹⁴⁹ *Id.* at 32-33.

¹⁵⁰ *Id.* at 35-36.

¹⁵¹ See *Mugler v. Kansas*, 123 U.S. 623 (1887).

¹⁵² See FREYFOGLE, *supra* note 135, at 37-38.

By remedying only identifiable harm to people, we ignore everything that we cannot sense, cannot trace, cannot value, and cannot wait to experience. We also ignore the interests of generations to come, since compensation paid today provides them with nothing. We have no way of knowing, for example, what benefits might have come from the many species that we exterminate each day. This problem of undervaluation (or nonvaluation) becomes more extreme when we depart from our anthropocentrism and recognize intrinsic value in other life forms and ecosystems. These harms, too, will go undervalued unless and until we somehow add to our externalities analysis new, far broader definition of harm.

Id.

¹⁵³ *Id.* at 39-42.

¹⁵⁴ *Id.* at 41.

¹⁵⁵ See *id.* at 43.

answer to this conundrum accordingly requires a "gather[ing] as a community to set rules for communal conduct."¹⁵⁶ Public discourse, as opposed to free market individualism, may foster "a public, shared, and more lasting morality."¹⁵⁷ Only an ethic of the environment, as opposed to ownership of property, can make proper sense of the competing claims.

Freyfogle entitles this moral principle an "ethic of care."¹⁵⁸ Such an ethic requires each successive generation to recognize that responsibility over the earth's resources rests with themselves. Preservation only occurs when "the cares of many people go beyond the self-centered and the economic."¹⁵⁹ In this vein, Freyfogle seems to adopt a notion of collective virtue, like Rousseau's common good, which calls each of us to do right in the interest of the community. No matter how the distribution of land proceeds, no matter what the boundaries are, without a shared morality of care for the environment, individual land owners will "want to cut into the principal," which will eventually "hurt those who come later."¹⁶⁰ Under Freyfogle's theory, the relevant moral community includes not only persons living, but future generations as well. The duty to protect the environment for future generations is not without problems though, as Freyfogle notes that we cannot know the preferences of these people or determine how much weight to afford such preferences when weighed against our own.¹⁶¹ Nonetheless, the appeal of this notion is intuitive.¹⁶² It intuitively may be considered part of virtuous character, like honesty and kindness.¹⁶³ Freyfogle understands the foundational limitations and imprecision of such a norm, yet invokes it as a "plea for life and for opportunity, a plea for us to be stewards, temporary custodians for a rightful owner who will one day return for an accounting."¹⁶⁴ Freyfogle's attenuated

I am still at a loss on pricing the red-tailed hawks, the flickers, and the meadow voles that have their competing deeds to my land. Dollars, it seems to me, are for people, and dollar numbers respond to transient, fluctuating, human concerns. Am I wrong to sense, as I do, that the land somehow is above this pettiness of prices, that it has, or should have, a stability of value that dollars can never have?

Id.

¹⁵⁶ *Id.* at 41.

¹⁵⁷ Freyfogle, *supra* note 135, at 42.

¹⁵⁸ *Id.* at 31.

¹⁵⁹ *Id.* at 31-32.

¹⁶⁰ *Id.* at 32.

¹⁶¹ *See id.* at 87-88.

¹⁶² *See* FREYFOGLE, *supra* note 135, at 89.

¹⁶³ *See id.*

¹⁶⁴ *Id.*

theoretical discussions in this book may require further explication and analysis. His critique of traditional property rights helps to demonstrate the shortcomings of individualism in the environmental age. The argument does not offer a clear-cut alternative definition of property or of rights in property, but suggests the adoption of new ethical norms which fully recognize the impact private decisions might have on persons within the broader society and the world. His aspirational arguments resemble altruistic importunings, rather than normative advocacy of legal and public policy changes. Moreover, in his analysis of future generations, Freyfogle implicitly broadens the relevant moral community to include living persons and those to come. Once society dispenses with the notion of property as absolute domination over land, the grounds for seeing communal obligations posed by property ownership may become more apparent.

III. TOWARD A COMMUNITARIAN UNDERSTANDING OF REAL PROPERTY RIGHTS

The arguments of Dworkin, Unger, and Freyfogle contribute something unique to a theory of property rights which entails communal obligations. Each has a different project. Dworkin seeks to develop a coherent interpretation of Anglo-American legal systems he considers basically just. Unger seeks a transformative, emancipatory democracy which will liberate individuals while creating a more just society. Finally, Freyfogle wants to reconstruct our understanding of our relationship to the natural world in the hope of realizing true environmental protection. While each theorist comes from completely different philosophical traditions, they manifest consistency in their understanding of individuals' relations to communities and the need to develop a political theory supportive of communities. Moreover, there appears to be some basic understanding of the respective roles of communities and the legal system in creating space for communal development.¹⁶⁵ Accordingly, this section will articulate an under-

¹⁶⁵ All three theorists seem to recognize the need for some sort of reciprocity between the members of the group. This type of condition for establishment of a community has been termed one of "mutuality." See Lawrence C. Becker, *Community, Dominion, and Membership*, 30 So. J. PHIL. 17, 20 (1992) (defining "extent to which members of the group recognize themselves and each other as members of the group, make and recognize reciprocal contributions to each others' lives, have a common understanding of the nature of the group, and have univalent responses to it and to each other.") Such communal ties simultaneously require respect for the community by the individual and respect for the individual by the community.

standing of real property rights which involves a commitment to community, relying on some of the philosophical observations of Dworkin, Unger, and Freyfogle.

Determining the role of community in defining property rights is similar to the classic utilitarianism versus rights debate. Utilitarianism is often criticized for allowing one individual's rights to be sacrificed for the benefit of the many.¹⁶⁶ Moreover, utilitarianism is frequently rejected for its inability to treat the individual as having an independent moral value. Alternatively, rights-based theories make individual rights foundational, thereby avoiding the conflict between an individual's rights and society's preferences.¹⁶⁷ Rights-based theories have been criticized for failing to give the community any power over the individual.

Essentially the debate over the Takings Clause involves the same concerns. As Justice Scalia discussed in the *Lucas* opinion, an individual ought not be sacrificed to uphold a community's preferences for a particular regulation.¹⁶⁸ This Essay has sought to illustrate how the community's right to adopt a scheme under which its members will live cannot be squared with strong real property rights. In either case, the question is somewhat paradoxical: property rights are essential to preserving individual autonomy from communal intrusions, yet when taken too far, paraphrasing Justice Holmes, they undermine the development of the community which the grant of individual rights was intended to safeguard.¹⁶⁹ As the theorists discussed in this Essay suggest, while some societies might function adequately with strong property rights (roughly understood as *Lucas's* holding), in a society seeking to become more than an associative community¹⁷⁰ or

¹⁶⁶ See generally R.G. Frey, ed., *UTILITY AND RIGHTS* (1984).

¹⁶⁷ *Id.*

¹⁶⁸ See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1024 (1992).

¹⁶⁹ This concept can be found in the writings of Hume. See GERALD J. POSTEMA, *BENTHAM AND THE COMMON LAW TRADITION* 102 (1986). Postema discusses Hume's political philosophy and argues that "Hume's substantive view is that social order and stability, and thus the possibility of all social intercourse, rest on the foundation of stable possession of material goods." *Id.* But Postema also notes that Hume understands "property to underwrite and structure all social relations, positions, and conditions." *Id.* Such a theory seems to recognize the need for society to be careful in allocating property rights in the hope of ensuring harmonious social relations, which might be made more difficult if property rights are allocated unequally.

¹⁷⁰ See DWORKIN, *supra* note 90, at 209 (describing a "de facto" community where the members happen to inhabit the same geographic location but share none of the same characteristics, common heritage or values).

assemblage of individuals, such a conception of property rights may disrupt social harmony.

Putting the question in terms of Dworkin's work, although some property rights are necessary to prevent majoritarian abuses and may form the conditions for the possibility of a community, under what conditions ought the claims of property owners yield to the majority?¹⁷¹ The place of environmental regulations may illustrate how to treat the competing claims.

To begin with, property rights form the foundation of a market for land. One acquires property in land subject to certain encumbrances, such as zoning laws, and certain "background principles" of nuisance and other clear harm-preventing rules.¹⁷² Such rules are part of the rights which form the basis of the market, much like the rules of language form the basis of a "language game."¹⁷³ As a socially constructed "game" the rights and the rules of the game are a matter of social and political stipulation rather than objectively determined

¹⁷¹ In Dworkin's terms such a conflict is one of principle, or right claims, versus policy, or utilitarian claims. See DWORKIN, *supra* note 102, at 82-84.

¹⁷² Although not considered in Justice Scalia's *Lucas* opinion, the relevant encumbrances and background principles which might define one's "reasonable investment backed expectations" could be precisely the interest of the community in ensuring a healthy environment, biological diversity or preservation of land for its own sake. Frank Michelman observes that persons frequently purchase property with at least a "tacit understanding" that "society reserves the right to preempt exploitation of a certain narrowly described class of resources at any time, and that no one is to form any inconsistent expectations about the future use and control of those resources." Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1240 (1967). This Essay has sought to show that rather than subsisting in the background, such principles define the property rights themselves.

¹⁷³ See generally LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* (G.E.M. Anscombe ed., 1953). Wittgenstein discusses rules of chess as an example of the function of rules in any use of language. Although the rules form the basis of play in the game, the rules also function to, in a sense, *define* the game itself, "if a rule of the game prescribes that the kings are to be used for drawing lots before a game of chess, then that is an essential part of the game." *Id.* § 567. In the legal system, the rules and regulations prescribing proper play constitute the game itself. Since the rules of any game are the result of stipulation, arguments that any change of the rules governing property ownership would change the "free market" are simply truisms, and cannot be given conclusive weight. Indeed, as Lyotard argues, the rules of a given language game are not self-legitimizing, but instead devolve from a contract between the players of the game. See JEAN-FRANCOIS LYOTARD, *THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE* 10 (1984). Justification on such an understanding comes not from appeals to the game itself or the rules defining the game but "consists in appealing to something independent." WITTGENSTEIN, § 265. The burden thus falls on those who seek to retain the current conception of property rights to justify their position by virtue of some independent, higher order principle which explains why the rules governing real property include some rules yet exclude others.

ideals. These stipulated rules, rather than derivative of the game or market, are actually *constitutive* of the institution itself.¹⁷⁴

How we conceptualize the market for real property within this framework will effect our understanding of the role of community. One can propose a number of competing hypotheses concerning the balance of communal interests and individual rights. On the one hand, rules supporting property rights could be stricken from the game when detrimental to the community. Such a theory would conceive of property rights as having mere *prima facie* validity rather than as having some inviolable status. Property rights would then yield to communal concerns when expedient. In practice, such a theory could break down into a mere utilitarian system in which rights had no independent status. Alternatively, the communitarian basis of property law could wholly supplant the traditional rights-duties dichotomy in property law making the interests of the community paramount. On such a theory, property rights would be viewed as wholly subsidiary to communal concerns. The chief organizing principle of such a system would involve a commitment to fostering community perhaps at the expense of individual rights. Both possible theories are unacceptable. While possibly compatible with Freyfogle's environmental ethic, they are incompatible with a community built on rights as envisioned by Dworkin and Unger.

Dworkin and Unger are united on some basic level in their belief that law can support communal development. Although Unger conceives of a more activist, transformative democracy, both thinkers see rights as an essential component to the development of community. Within Unger's work, however, a more critical view of rights emerges. Rights—particularly property rights—instead of supporting communities, may tend to undermine them. Unger's critique of the rights holder as capable of removing himself from the "tangle of claims to mutual responsibility" illustrates an undesirable side-effect of rights.

¹⁷⁴ This constitutive role of rules in a game is analogous to the role of the regulatory state in preserving a mechanism for preference formation. See CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION* 41–73 (1990), (describing the "facilitative function" of regulations in ensuring proper mediation and appropriate weight given to private preferences and the public interest). Indeed, as Sunstein notes, rules (and regulations) which limit the activities of private actors may be the only means of ensuring that public concerns are not undermined by the activities of individual actors in the free market. See *id.* at 43. For Sunstein, the importance of the regulatory state is to prevent the tendency of the market, if unchecked, to frustrate the collective preferences of the individuals in the group. See *id.* at 41–42; see also LYOTARD, *supra* note 171, at (noting that "where there are no rules, there is no game").

Here, Unger foreshadows Freyfogle's reconception of property rights. The problem becomes one not of redefining the formal rules of the game itself but of reimagining the substantive nature of property rights, forming the basis upon which transactions within the market are executed.

The three writers discussed in this Essay provide a basis for reconstructing property rights by synthesizing communal ties and individual ownership claims. If communal concerns (such as environmental protection) are seen as already built into the notion of property rights, the situation in which property rights trump communal concerns or vice versa is eliminated. The choice becomes one not between a market system based solely on transactions of individual ownership claims and some system of communal ownership of property, but instead between the unfettered market operating separate from the needs of the community and a market situated within and shaped by communal concerns. The latter formulation requires communal concerns to receive standing as part of any analysis of real property ownership, as the property rights themselves may be seen as entailing a communitarian element. The ownership claim which is traded in the market for land will necessarily involve a communitarian component on this analysis.

This understanding opposes current takings law in which communal concerns are strictly scrutinized to determine whether such concerns are sufficiently important, as in the case of regulations concerning the environment.¹⁷⁵ The view proposed here does not amount to communal ownership of property, but simply a recognition that the ownership of property directly implicates obligations incurred through membership in a community.¹⁷⁶ In this way, Unger's concern about the tendency of rights to insulate the individual from the community is

¹⁷⁵ See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1003 (1992).

¹⁷⁶ Accordingly, arguments regarding the tragedy of the commons and "common pools" of property are unavailing, as such arguments assume that communal *responsibility* entails communal *ownership*. See Richard A. Epstein, *Possession as the Root of Title*, 13 GA. L. REV. 1221, 1236-38 (1979). One might rightly argue that the community has an interest in preserving the environment and thereby has a right to a clean environment, thus precluding individual land owners from using their land so as to undermine the community's interest in the land outside the particular parcel an individual owns. Understanding the public interest in the environment does not, however, create an equivalent countervailing *right* of the public as in the case of public lands. See Daniel S. Levy & David Friedman, *The Revenge of the Redwoods? Reconsidering Property Rights and the Economic Allocation of Natural Resources*, 61 U. CHI. L. REV. 493, 515 (1994). Instead it means affording communal concerns a permanent status in any analysis of real property rights.

minimized. Moreover, it may reduce the danger of the market frustrating the collective preferences of society.¹⁷⁷

Such a reconception of property rights would reject the creation of an insurance scheme under the guise of the Takings Clause¹⁷⁸ to cover all burdensome regulations. Such an insurance scheme tends to create an antagonistic relationship between individuals and communities by making societal public policy choices subject to individual economic interests.¹⁷⁹ It also may prevent the compromise of the community's ability to govern itself to the extent that within the current paradigm discourse is undermined by an excessive preoccupation with rights claims¹⁸⁰ and the realm of possible political questions itself has become

¹⁷⁷ See SUNSTEIN, *supra* note 172, at 41–42.

¹⁷⁸ Overgenerous compensation schemes may actually produce disutilitarian results insofar as investors may “play the market” by taking certain risks with the expectation of receiving compensation should certain events occur. See Daniel A. Farber, *Public Choice and Just Compensation*, 9 CONST. COMMENTARY 279, 284–85 (1992). While some adjustments may be made which would limit investors’ recoveries, such adjustments can only be made *post hoc* and would be prone to arbitrary and subjective determinations, creating a compensation scheme both underinclusive and overinclusive.

¹⁷⁹ The anomaly arises from the competing nature of rights in takings cases. While requiring just compensation to the landowner clearly furthers the rights of the individual, the individual is simultaneously undermining some right of the community to, for instance, regulate its environment. Accordingly, the individual right to just compensation changes the relationship of the individual to the community. Just compensation allows land owners to force economic concerns into relationships previously immune to such factors. This increasing tendency to demand compensation from the community “has extended the instrumental relationships of the market-place into spheres previously informed by a sense of uncalculated reciprocity and civic obligation.” Daniel A. Bell, *Together Again?* N.Y. TIMES LITERARY SUPPLEMENT, Nov. 25, 1994, at 5 (reviewing Amitai Etzioni’s book *THE SPIRIT OF COMMUNITY* (1994)).

¹⁸⁰ See Mark Tushnet, *The Critique of Rights*, 47 SMU L. REV. 23, 32 (1993) (noting that the rhetorical force of rights tends to create a climate in which compromise becomes impossible). When both the majority and the minority assert claims of right and “counter-right,” the ability to deliberate and sort out the respective claims tends to be undermined, as each side views their claim to require absolute deference to their claim. See *id.* Indeed, when “rights” claims are given conclusive determination, they become permanent fixtures, which create “winners” and “losers” well into the future. See *id.* Alasdair MacIntyre similarly condemns the counterproductive nature of rights rhetoric. He invokes Aristotle to support his claim that without some shared understanding of the human good arising from membership in a community, *rational* inquiry in politics, ethics and practical affairs would be impossible. ALASDAIR MACINTYRE, *COMMUNITY, LAW, AND THE IDIOM AND RHETORIC OF RIGHTS* 96 (19xx). Such shared understandings may arise through two plans of action:

First, we need to restore the centrality of a conception of justice in the light of which we can formulate concerns about both desert and needs, in terms of an overall conception of a type of community once again informed by a shared conception of, and directed towards a shared achievement of, the ultimate human good. . . . [Second], [p]recisely because those engaged in making and sustaining [the community] will be able to act effectively only if guided by highly determinate conceptions of the institutions and way

reduced.¹⁸¹ Rather than focusing exclusively on claims of right as excluding communal concerns, both communal concerns and claims of property rights must be considered together in an effort to achieve mutual understanding.

This Essay does not claim that a communitarian approach to real property will prove a panacea. Indeed, communitarianism has not been without its critics. One might ask what of the rights of property owners as against the community?¹⁸² First, although the theory outlined above suggests justifications for greater communal control, it does not purport to dramatically reconstruct rules governing private ownership of real property.¹⁸³ Second, to the extent that discourse and

of life which they are engaged in creating, they will have to exclude and prohibit a variety of types of activity inimical to and destructive of those institutions and that way of life.

Id. at 108 (emphasis added). The latter principle seems similar to my argument that property rights ought not undermine the existence of the community itself. The entrenchment of rights talk when considering issues of property, tends to undermine the development of such a shared understanding of broader questions of justice as well as the ability of the community to delineate specific norms governing property.

¹⁸¹ The strengthening of individual property rights by the judiciary confounds the importance of political discourse within a community. Where a functioning regulatory or adjudicatory system might evaluate the conflicting claims of communities and individuals, by strengthening individual rights and redrawing the threshold line defining what constitutes relevant harms, the role of discourse in the community is reduced. The realm of possible political discourse becomes subsumed by the law and legal principles. *See generally* PAUL CAMPOS, *JURISMANIA: THE MADNESS OF AMERICAN LAW* (1998). To the extent that postmodernism has shaken our concept of truth, the failure of the law to make room for discourse as a means of mediating conflicting claims of right seems unjustified at best and arrogant at worst. *See generally* JURGEN HABERMAS, *MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION* (1992).

¹⁸² For an example of this type of criticism against communitarians, in particular civic republicans, *see* Steven G. Gey, *The Unfortunate Revival of Civic Republicanism*, 141 U. PA. L. REV. 801, 803 (1993), in which the author suggests that the "left's traditional support for civil liberties is incompatible in certain respects with civic republican theory." Gey may be correct that civic republicans overstate their case and rely on "faith" that discourse alone will further the public good, but he fails to take seriously the need to increase and institutionalize discourse in the administration, if not the allocation of rights. *Id.* at 841. Moreover, as Drucilla Cornell, among others, has noted, rights are, in some sense, the *sine qua non* of the community itself:

[D]ialogic communitarians argue that: 1) even if the liberal principle of neutrality towards competing visions of the good must be rejected, there are still certain basic participatory conditions of citizenship that we can call rights, which must be bracketed from the day-to-day political struggles. Rights, in other words, must be a part of a vision of the collective good in modernity.

Cornell, *supra* note 110, at 696. Gey's observations regarding the slippery slope which compromises on civil liberties may entail is not without merit. Nonetheless, as argued in this Essay, our conceptions of rights are open to change. Such conceptions can entail a communitarian element, without compromising the protection rights afford.

¹⁸³ It is not even clear that the Just Compensation Clause was intended to function as the

possible compromises regarding the proper weight to afford property ownership are undermined by recent Supreme Court rulings, enhancement of such mechanisms can promote communitarianism without destroying individual rights. In addition, by reconceiving property rights as entailing communal responsibilities, the community also incurs certain obligations to the landowner. To this end, regulatory flexibility and proper public proceedings in determining dispositions of property can safeguard the rights of the landowner while taking account of communal concerns.

V. CONCLUSION

Many times the debate surrounding property rights involves persons arguing at cross purposes. The environmental movement has dramatically reshaped our understanding of property and its role in the wider society. As a descriptive matter, we no longer accept the notion of property as providing unfettered ownership rights. As Freyfogle shows, environmental concerns have reshaped our understanding of real property. It is from this vantage point that the current Supreme Court's attempt to turn back the clock seems atavistic and anti-democratic. While it is clear that our law will always recognize individual property rights, how we define such rights certainly has normative implications. With a reevaluation of the effect of real property on the development of community, perhaps over time our notion of property rights can be expanded to satisfy the countervailing demands of communities.

current Supreme Court has construed it. Allowing for evolution of our conceptions of the Constitution need not allow changes which subvert the very principles of community the Constitution was designed to support. Traditional rationales for property ownership are not even applicable today, exemplified by the original limitation of voting rights to property owners. See generally William Michael Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694 (1985). Moreover, the notion of property rights to which the Takings Clause refers has not been frozen in time. Surely, the rise of the regulatory state has affected the law's treatment of property rights.